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No. 276

In the Supreme Court of the United States

OCTOBER TERM, 1960

MASSOAD ABDALLAH HIDICK, PETITIONER

v.

ORION SHIPPING AND TRADING CO., PACIFIC CARGO CARRIERS CORP., and UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The District Court for the Southern District of New York filed no written opinion in entering judgments based on the jury's verdict for respondents (P. 5a).[1] The opinion of the Court of Appeals for the Second Circuit (Pet. App. 11-13), is reported at 278 F.2d 114.[2]

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[1] "P." refers to the appendix to petitioner's brief in the court below. "R." refers to the appendix to the Government's brief below.

[2] The District Court's opinion in support of its denial of the United States' motion to dismiss the third party claim, not involved here, is reported at 157 F. Supp. 477.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 1960 (Pet. App. 14). The petition for a writ of certiorari was filed on July 28, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, certain prior written statements of persons not present to testify were properly excluded from evidence.

STATEMENT

Petitioner brought this action against respondent Orion Shipping and Trading Co., Inc., owner of the S.S. SEACORONET, and respondent Pacific Cargo Carriers Corporation, operators of the vessel. The United States, time charterer of the vessel, was brought in as a third-party defendant. The gravamen of the petitioner's complaint was that, on August 17, 1953, chlorine gas escaped from a container being loaded aboard the vessel in Pusan, Korea, and that petitioner, a seaman aboard the vessel, inhaled the gas and was permanently injured.

At trial, respondents made no effort to contradict the fact that, as shown in the vessel's log (P. 8a), gas did escape in the ship on the day in question, requiring the evacuation of the crew. Instead, all of respondents' evidence tended to show that petitioner, whether or not he came in contact with the gas, suffered none of the injuries he claimed. Thus:

it was shown that petitioner walked off the vessel under his own power during the evacuation (R. 10a, 35a, 36a), and that medical examinations of petitioner two weeks and ten weeks after the accident showed no signs of exposure to the gas (R. 1a, 2a). Additionally, experts on the physiological effects of chlorine gas testified that, if no injuries are manifested shortly after a person comes in contact with the gas, ill-effects do not later develop (R. 97a, 119a, 122a). The jury returned a verdict for the respondents, and the district court entered judgments in their favor (P. 5a).

Petitioner appealed to the Court of Appeals for the Second Circuit, asserting, *inter alia*, that the district court erred in refusing to admit into evidence written statements, made available to the petitioner before trial, by the master and other officers of the vessel, whom petitioner did not call as witnesses (P. 11a-20a, 42a-52a). These statements made no reference to the petitioner or any injury suffered by him, but merely showed the fact—uncontested by respondents—that gas had escaped aboard the vessel, necessitating the evacuation of the crew (P. 42a-52a).

In affirming the judgment of the district court, the court of appeals held that the written statements were properly excluded, since "[T]he persons making them were not present at trial." Noting that nothing in the statements in any way contradicted the position of the respondents at trial, the court stated that the statements were "but cumulative of the information contained in the log" (Pet. App. 13).

ARGUMENT

The decision below is clearly correct, turns on the particular facts, and involves no conflict with other decisions. Further review is not warranted.

The exclusion of the written statements involved here is plainly correct under the hearsay rule, since the record contains no showing that the persons making the statements could not have been called as witnesses by petitioner, or that some special exception to the hearsay rule favored the admission of the statements. The correctness of the decision below is further supported by the fact that the statements were merely cumulative of what was already shown in the ship's log and uncontested by the respondents —that gas escaped aboard the S.S. SEACORONET, necessitating the evacuation of its crew. The admission of the statements, therefore, could not have affected the jury's verdict in the district court, which must have been based on a finding that, although gas did escape aboard the vessel, petitioner did not, as a result, suffer the injuries he claimed.

Petitioner asserts (Pet. 2-3) that the decision below is in conflict with *Cox* v. *Esso Shipping Co.*, 247 F.2d 629 (C.A. 5). In *Cox*, the court held that statements by the master of a vessel were admissible in evidence under the exception to the hearsay rule for prior inconsistent statements by a party or his agents. The court, however, expressly stated that the exception applied only to statements of a party which were "inconsistent with the contention now being made in litigation." 247 F.2d at 632. Here, of course, no

such inconsistency is present. Further, the case is not, as petitioner asserts (Pet. 3), in conflict with *Sternberg Dredging Co.* v. *Moran Towing & Transportation Co.*, 196 F.2d 1002, where certain statements made in the regular course of business were held admissible. The record is barren of any foundation showing that the statements offered were made in the regular course of business (see P. 11a-20a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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